***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 76-7053

IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

MIRIAM WINTERS, on behalf of herself and all others similarly situated,

*Appellant,*

—against—

ALLAN D. MILLER, M.D., individually and as the Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; and DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DACORTA, and CATHERINE DROMGOOLE, and other doctors on the staffs of Bellevue and Central Islip State Hospital whose names are unknown to plaintiff,

*Appellees.*

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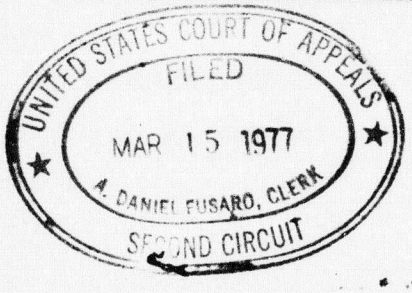


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## BRIEF FOR APPELLANT

### Preliminary Statement

This is an appeal by Miriam Winters, plaintiff below, from an order of the United States District Court for the Eastern District of New York, Judd, J., dated December 16, 1975, denying plaintiff's motion for a new trial following jury verdicts in favor of all defendants, and from an order of the United States District Court for the Eastern District of New York, Mishler, Ch. J., dated March 1, 1977, denying plaintiff's second motion for a new trial based on the loss of essential transcripts.

## Statement of the Issues

When the Court of Appeals for the Second Circuit upheld Miriam Winter's right to refuse medical treatment on religious grounds and remanded the case to establish the extent and allocation of liability:

1. Did the trial court fail to follow that remand by retrying all issues of law and fact in a negative context which was highly detrimental to appellant's right to a fair trial and claimed relief?

2. Did the trial court commit numerous and prejudicial errors of law involving, but not limited to, evidentiary rulings and the charge to the jury, all of which, separately and together, denied appellant her right to a fair trial?

3. Did the prejudicial remarks made at trial by the court and by defendants' attorneys and which negatively influenced the jury deprive appellant of her right to a fair and impartial trial?

## Facts

Appellant Miriam Winters is a follower of Christian Science beliefs. In May, 1968, she was involuntarily admitted to Bellevue Hospital, and transferred from there to Central Islip State Hospital, where she was confined for several months. Throughout her stay at Bellevue and Central Islip, Miss Winters was regularly given medication, including heavy doses of tranquilizers administered both orally and intramuscularly. This medication was given her against her will and over her clearly, consistently and constantly stated religious objections. Plaintiff thereafter brought this action for damages, under 42 U.S.C. §1983 (1970), in the United States District Court, Eastern Dis-

trict of New York, against the directors of Bellevue and Central Islip Hospitals, the Commissioner of Mental Hygiene, and the staff doctors involved. Defendants-appellees were sued in both their official and individual capacities.

## Prior Proceedings

Miss Winters has been before this Court on three prior occasions. On May 26, 1971, this Court reversed a decision of the district court which had granted defendants motion to dismiss the complaint. *See Winters* v. *Miller,* 306 F.Supp. 1158 (E.D. N.Y. 1969) (Travia, J.). This Court found that appellant's constitutional rights had been violated by the forced medication, and remanded the case. *See Winters* v. *Miller,* 446 F.2d 65 (2d Cir.), *cert. denied,* 404 U.S. 984 (1971) (37a).*

In January of 1974, Judge Travia ordered plaintiff to submit to a physical and mental examination pursuant to Rule 35 of the Federal Rules of Civil Procedure, and all proceedings were stayed. She then returned to this Court, which on April 1, 1974, issued a writ of mandamus prohibiting the Rule 35 examination, and again remanded the case to the district court. *See Winters* v. *Travia,* 495 F.2d 839 (2d Cir. 1974) (56a).

In June of 1974 the parties had a pre-trial conference with Judge Orrin G. Judd, to whom the case had been transferred. Depositions were scheduled and subsequently taken, with the proceedings then set for trial on November 4, 1974. Because of delays in transcribing the depositions, however, the parties understood that the trial was being re-scheduled, and none of the parties and only one of the lawyers appeared on November 4. The court dismissed the action, but after a conference that afternoon agreed to hear a motion to re-open.

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* References are to pages of the Appendix throughout this brief.

At the hearing on the motion to re-open pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, held on December 13, 1974, the court reinstated the action against all defendants except Doctors Miller, Thomas and Ollins. Plaintiff appealed from that order, and on June 6, 1975, this court ruled that the trial court's order reinstating the action only as to some defendants was an abuse of discretion. The case was remanded so that plaintiff could proceed against all the named defendants. *See Winters* v. *Miller,* 517 F.2d 1337 (2d Cir. 1975) (68a).

The trial was held July 24-31, 1975, and resulted in jury verdicts in favor of all defendants, including those who defaulted. Plaintiff made an oral motion for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. A Memorandum of Law was submitted by plaintiff, and the motion was heard on September 26, 1975. On December 16, 1975, the district court issued its Memorandum and Order denying plaintiff's motion for a new trial (73a). Notice of Appeal was filed January 14, 1976, and leave to appeal *in forma pauperis* was granted on February 19, 1976.

After continuing lengthy delays because of her inability to secure a complete transcript, Miss Winters was forced to return to the District Court for further relief. A second motion for a new trial based on the grounds of missing transcripts was made and submitted in February, 1977. The district court, per the Honorable Jacob Mishler, Chief Judge, denied that motion in a Memorandum of Decision and Order, dated March 1, 1977 (94a).

This appeal is from both of those orders of the United States District Court for the Eastern District of New York, both of which denied Miriam Winters her right to a new trial, properly and fairly conducted.

# ARGUMENT

## POINT I

### The Trial Court's Failure to Follow the Law of the Case Set by This Court's Prior Opinions Deprived Appellant of Her Right to a Fair Trial Properly Conducted.

**(A)** ***The law of the case clearly limited the trial on remand to specific issues involving the extent and allocation of damages resulting from the treatment unlawfully forced upon appellant.***

This case has always been, and still is, about one woman's claim for damages resulting from medication forced upon her over her repeated objections to such medical treatment. It is not about, and never has been about, the circumstances which led to appellant's involuntary commitment to Bellevue Hospital, or the legality of that involuntary commitment, or plaintiff's mental state at the time of that commitment. Yet the trial of her claim for damages was conducted as if those latter points were at issue, when in fact they were not. Resulting primarily from the trial court's misapprehension of the case following this court's remand in 1971, the practical effect was to shift the burden of persuasion from the defendants to plaintiff: rather than requiring those physicians to prove they had compelling reasons for overriding appellant's clear and vehement objections to treatment in order to force it upon her,[1] the

[1] This would ordinarily be the import of the so-called "good faith" defense which is available to some governmental defendants in cases brought under 42 U.S.C. §1983 (1976). *See* Wood v. Strickland, 420 U.S. 308 (1975). But appellant does not concede the applicability of such a defense in this case. She maintains that the common law, statutory and constitutional rights at stake here are so clear that no defense was available against forcing treatment on an involuntary patient neither adjudged incompetent nor dangerous in any way to herself or others. That position follows directly from this Court's conclusion that without a finding of legal

burden was instead put on Miss Winters to prove she was mentally competent and had justifiable reasons for resisting the doctors' "superior" judgments on her behalf. This reversal of roles and error of law occurred because the trial court apparently misunderstood the crucial difference between an involuntary commitment based on medical diagnosis of mental illness, and a legal finding of incompetency. Only the latter allows the state, through its agents (here, the Bellevue and Central Islip Hospital physicians), to substitute its judgment for the patient's. This distinction has been repeatedly recognized, by this court and others, as the law in the state of New York.[2] Even a finding of insanity by a physician has no legal consequence, absent a physical threat to the patient or others, outside the specific commitment decision.

This Court first considered Miss Winter's claims in 1971, and after reviewing the hospital records in their entirety,[3]

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incompetency *"there is no justification for defendants-appellees substituting their own judgment for that of their patient"* where the patient's religious views are genuine. Winters v. Miller, 446 F.2d 65, 69 (43a) (2d Cir.), *cert. denied*, 404 U.S. 984 (1971) (emphasis supplied) (45a). But taking the broadest possible view of the issues presened by this case, such an inquiry could be relevant on remand if this Court so directs.

[2] *See, e.g.*, Winters v. Miller, 446 F.2d 65, 69 (2d Cir.) (43a), *cert. denied*, 404 U.S. 984 (1971); Dale v. Hahn, 440 F.2d 633, 639 (2d Cir. 1971); Hoff v. New York, 279 N.Y. 490, 494, 18 N.E. 2d 671 (1939); In re Lugo's Guardianship, 10 Misc.2d 576, 172 N.Y.S.2d 104, 108 (Ct. of Claims 1958).

[3] This Court made numerous references which manifest its thorough reading of the record, in the first appeal, which included not only the complete hospital records but sworn affidavits of Miriam Winters and her attorney Bruce Ennis. The affidavit of Miss Winters contained all of the pertinent information later adduced in her testimony at trial. *E.g.*, "the record clearly indictes that she brought her objections to physical medication to the attention of the hospital staff, but her protests were ignored." Winters v. Miller, 446 F.2d at 68 (40a). Because the trial court erroneously restricted all testimony to the hospital records, *see* discussion *infra*,

"reverse[d] and remand[ed] for further proceedings as to the claim for damages resulting from the forced medication in violation of the plaintiff's right to freedom of religion under the First Amendment."[4] Judge Moore, dissenting in part, did so because he disagreed with the court for, "in effect, granting summary judgment for the plaintiff."[5] Thus this Court found as a matter of law that plaintiff's First Amendment rights were violated by the forced medication, and this finding became the law of the case. Accordingly, the "further proceedings" at trial should have been limited to three issues: (1) the range of plaintiff's emotional and physical suffering, and the amount of damages necessary to compensate that injury; (2) which defendants were in fact individually liable; and (3) whether any of those defendants, if found liable, could successfully assert a defense of good faith as a bar to personal liability.

Instead, the trial court treated this case more like a common tort action involving the balance of judgments between professionals and a woman alleged insane.[6] The court required Miss Winters to prove every element of her case,[7] including the proposition, conclusively decided by this

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at note 29, no new evidence, besides additional testimony of appellant herself, was introduced at trial except for expert opinions about those records. Moreover, none of the evidence in the record on that first appeal was ever controverted at the subsequent trial. Accordingly, this Court's findings of fact about the hospital records are, if not controlling, highly persuasive.

[4] 446 F.2d at 67 (38a).

[5] *Id.* at 72 (50a).

[6] *See* Memorandum and Order denying plaintiff's Motion for a New Trial, No. 69-C-783, Dec. 17, 1975, at 20 (92a).

[7] The district court characterized the trial as follows: "The concrete case presented by the evidence is different from the somewhat abstract issues which have heretofore been presented to the courts." *Id.* at 3 (75a). But this assertion is belied by the fact that the evidence at trial was really no different than that relied on by this Court in 1971, as argued *supra,* at note 3.

Court, that her right to freedom of religion had been violated:

> So you can take the law to be *if* the plaintiff was forced to take medication and *if* it violated her religious beliefs and *you believe* her constitutional rights were violated, then it is for you to determine . . . .[8]

Thus the trial court's failure to follow the law of the case resulted in a grave error of law—the jury was given the opportunity to decide issues which were legally foreclosed by this court's 1971 opinion. The trial court had the duty to keep these issues from the jury,[9] and its failure to do so entitles appellant to a new trial.[10]

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[8] Reference is made from the trial court's charge to the jury. Transcript at 673 (147a) (emphasis added).

[9] The law of the case applies to any and all issues decided, either explicitly or implicitly. *See* Terrell v. Household Goods Carriers Bureau, 494 F.2d 16 (5th Cir. 1974), *rehearing denied*, 494 F.2d 16, *cert. denied*, 95 S.Ct. 246 (1975); *cf.* Dale v. Hahn, 486 F.2d 76 (2d Cir. 1973), *cert. denied sub nom.*, Miller v. Dale, 419 U.S. 826 (1974). Also, when no issue of fact is left unresolved, it is improper to send that issue to the jury. *See* Schiemann v. Grace Line, 269 F.2d 596 (2d Cir. 1959). Thus, since this Court in its prior opinion had already resolved the major issue of fact in the case—that plaintiff's right to freedom of religion was indeed violated by the medication forced on her by the defendant physicians—and since that finding constituted the law of the case, the trial court had the duty to keep the question of constitutional violation from the jury. The proper analogy is to a directed verdict where liability has been found as a matter of law, but the amount of damages must still be decided by the jury. *See* F.R. Civ. P., Rule 50, 28 U.S.C. (1976); *e.g.*, Richmond Television Corp. v. United States, 354 F.2d 410 (4th Cir. 1965) (when facts are plainly conclusive, court's function is to refuse submission of the issue to the jury). Motions for a directed verdict have been compared to a motion for summary judgment—recall Judge Moore's assertion in his dissenting opinion, *supra* note 5, that summary judgment had been granted in favor of plaintiff by the first decision on appeal—in that they challenge the existence of a genuine issue of fact. *See* Urti v. Transport Commercial Corp., 479 F.2d 766 (5th Cir. 1973).

[10] A motion for a new trial may be based on a claim that the trial was unfair, and may present questions of evidence and of

The reasoning of this Court's 1971 opinion compels the conclusion that the trial should have been limited to the issues of damages, personal liability of each defendant, and the good faith defense. The Court said:

> It is clear and appellees concede that if we were dealing here with an ordinary patient suffering from a physical ailment, *the hospital authorities would have no right to impose compulsory medical treatment against the patient's will* and indeed, that *to do so would constitute a common law assault and battery.* The question then becomes at what point, *if at all,* does the patient suffering from a mental illness lose the rights he would otherwise enjoy in this regard.[11]

In finding (1) that "the law is quite clear in New York that a finding of 'mental illness' even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is 'incompetent' or unable adequately to manage his own affairs,[12] and (2) that "there is no evidence in the record that . . . the state was in any way protecting the interest of society or even any third party," [13] this Court answered its own question[14] negatively to hold that such a point had not been reached, in this case at least, where society's interests took precedence over the constitutional rights of Miss Winters.

In this case, then, "the patient suffering from a mental illness [did not] lose the right[s] he would otherwise en-

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erroneous instructions. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, *motion denied,* 310 U.S. 612 (1941).

[11] 446 F.2d at 68 (41a) (emphasis added).

[12] *Id.*

[13] *Id.* at 70 (45a).

[14] *See* text accompanying note 11, *supra.*

joy."[15] Thus her attending physicians, without a finding of legal incompetency, were required to take plaintiff's objections to treatment at face value and to honor her principled refusal to take medication. Their failure to do so was a *prima facie* violation of her First Amendment rights because *"there [was] no justification for defendants-appellees substituting their own judgment for that of their patient,"*[16] which she made clear and which they understood was based on her religious principles.[17] Indeed, by properly applying this Court's controlling rationale from the 1971 opinion,[18] defendants' forced treatment of Miss Winters constituted an assault and battery as a matter of law. Instead, however, not only was plaintiff required to prove that her constitutional rights had in fact been violated, but irrelevant and immaterial evidence concerning the circumstances of her involuntary commitment was, as a consequence, admitted as well. This relationship between the court's failure to follow the law of the case, and the resulting prejudicial errors of law at trial, is argued below at Points I(B) and II(C).

**(B) *The trial court's failure to follow the law of the case was also the primary cause of other errors of law highly prejudicial to appellant.***

The trial court's misapprehension of the law of the case, and its decision to require plaintiff to prove the actual fact of a constitutional violation, prejudiced her in the jury's eyes and led to important errors of law throughout the trial.[19] For example, during most of the trial proceed-

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[15] 446 F.2d at 68 (41a).

[16] *Id.* at 69 (43a) (emphasis added).

[17] *See, e.g.*, testimony of defendant Dr. Howard Blankfeld, Transcript at 512 (135a).

[18] *See* text accompanying notes 11-12, *supra*.

[19] *See, e.g.*, discussion *infra* at notes 60-62.

ings, the court apparently relied on the *parens patriae* theory that was reasoundingly rejected by this Court, when it said:

> The basic fallacy of appellee's case thus becomes obvious. While it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her and such a relationship may be created if and when a person is found *legally* incompetent, there was never any effort on the part of appellees to secure such a judicial determination of incompetency before proceeding to treat Miss Winters in the way they thought would be 'best' for her.[20]

In clear contrast, the trial court made it clear to all that it felt the physicians had a "parental" duty to treat appellant:

> For the doctor to have done less than a violation of *obligation to the people of the state to seek a cure for the mentally ill patient, so that there'll be no longer dangerous* or disruptive to themselves or to the public and so that *they will no longer occupy space in a mental institution* . . . .[21]

Moreover, the court admitted that it had been reading from the wrong opinion:[22] the initial district court decision dismissing the complaint,[23] which was reversed by this Court in 1971 on those grounds.

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[20] 446 F.2d at 71 (47a) (emphasis in original).

[21] Transcript at 435 (125a) (emphasis added). It was never really contended at trial that plaintiff was even remotely dangerous to herself or others, and this Court came to the same conclusion in 1971. *See* 446 F.2d at 70 (45a).

[22] Transcript at 436 (126a).

[23] 306 F.Supp. 1158 (E.D.N.Y. 1969).

Although the trial court admitted its error, it is clear proof that for much of the trial the court was mistaken, and in turn misled the jury, about the posture of the case—a mistake which was prejudicial to plaintiff because it brought about, in large measure, the egregious errors of law discussed below, as well as placing her cause of action in the wrong perspective for jury deliberation. Because the trial court failed to follow the law of the case and refused to limit the issues properly to the extent and allocation of damages, the court—through its erroneous evidentiary rulings, its inaccurate instructions on the law, and its prejudicial remarks—let the trial center on points which were not only immaterial but also highly prejudicial, thus displaying the plaintiff in a very negative light. That is, the trial mistakenly centered on the incidents which led to the involuntary commitment and Miss Winters' mental state at that time.[24] For these reasons, and those which follow, appellant is entitled to a new trial limited to the issues of the amount of damages, personal liability of each defendant, and whether any defendant can prove a defense of good faith.

## POINT II

### The Trial Court Committed Prejudicial Errors of Law Which Denied Appellant Her Right to a Fair Trial.

#### (A) *The trial court improperly limited appellant's opportunity for examination of jurors during the voir dire.*

During the *voir dire* examination the trial court refused to ask certain questions requested by plaintiff. These proposed inquiries included:

> Do you believe mental illness can be treated and cured? Do you think all mental patients are dangerous? Do

[24] *See, e.g.*, text accompanying notes 54-57, *infra*.

> you think that honoring and respecting another person's religious beliefs is very important? Do you think that psychological pain can be as real and devastating as physical pain? Do you think a person's right to privacy extends to the right to control his or her own body?[25]

Instead, the trial court felt that simple questions concerning each juror's prior knowledge of the case, previous jury experience, religious feelings, and possible experiences with Bellevue or Central Islip were sufficient.[26] This made the *voir dire* examination a mere formal exercise, since it deprived appellant of the right to fathom the attitudes and possible prejudices of each juror toward her claim, whether each juror understood the critical difference between allegations of mental illness and competency to control one's life and affairs,[27] and whether that juror appreciated the important constitutional aspects of her claim and the gravity of the harm which appellant suffered. The failure of the trial court to allow a proper *voir dire* examination was prejudicial in that it effectively deprived plaintiff of her peremptory challenges to prospective jurors. This denial of the right to pick an impartial jury contributed significantly to the unfairness of the trial.

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[25] Plaintiff's Proposed and Further Proposed *Voir Dire* Questions, No.'s 13, 15, 17, 18, 23, respectively; Appendix at 189a.

[26] Memorandum and Order, *supra* note 6, at 15 (87a): "There was no need to probe the other specific matters which plaintiff requested." *Id.*

[27] "The very purpose of voir dire examination is to develop the whole truth concerning the prospective juror's state of mind, not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective jurors' suspected bias or prejudice." Photostat Corp. v. Bell, 338 F.2d 783, 786 (10th Cir. 1964).

This error of law, moreover, was compounded by the denial of plaintiff's second motion for a new trial,[28] which sought that relief on the grounds that the unavailability of transcripts for the *voir dire,* and other "pre-trial" proceedings, made it impossible for Miss Winters to substantiate her allegations of error on this appeal. It would indeed be a sad comment on our judicial system if erroneous rulings of law which have the effect of debasing important First Amendment rights, are effectively insulated from review by the lack of transcripts below. The possibility of such an injustice only adds another link in the chain of errors which have characterized this case and which entitle plaintiff to a new trial.

**(B)** ***The trial court improperly excluded relevant evidence which was offered by appellant to support her claim for damages.***

After mistakenly requiring plaintiff to prove the fact that her constitutional rights had been violated by the forced medication, the trial court then excluded or unfairly characterized evidence which she offered for that purpose. For example, opinion testimony of plaintiff's experts was excluded if based in part on Miss Winter's deposition, and all such testimony was then restricted to the hospital records.[29] The effect of this erroneous ruling of law was to severely restrict plaintiff's expert testimony and undermine a substantial part of her case as to proof of damages. The deposition was a proper basis on which a medical expert could rely to form an opinion.[30] The deposition was

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[28] *See* Memorandum of Decision and Order, dated March 1, 1977 (Mishler, Ch. J.) (94a).

[29] Transcript at 70-73 (100a-103a).

[30] F. R. Evid., Rule 703, 28 U.S.C.A. (1976):

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or

not itself offered in evidence, either as a substitute for appellant's testimony or as proof of its own assertions.

Alternatively, opinions of plaintiff's experts could have been taken subject to connection, since Miss Winters was scheduled to appear later at trial. However, not even that justification was necessary to allow her experts to testify fully and freely.

> Indeed, the newly adopted Federal Rules of Evidence make it clear that an expert may give his conclusions without prior disclosure of the underlying facts. Fed. R. Evid. 705. The weakness in the underpinnings of such opinions may be developed upon cross-examination and such weakness goes to the weight and credibility of testimony.[31]

This is true not only for opinions based on plaintiff's deposition, but also for other opinions offered by her experts, such as testimony on the nature and beliefs of Christian Science.[32] The trial court's error in barring this opinion testimony deprived appellant of her right to have the jury consider all relevant evidence in determining the extent of her damages.

The court's treatment of plaintiff's expert on psychiatric medicine, Dr. Eli Messinger,[33] is illustrative. When asked

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made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in framing opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[31] Polk v. Ford Motor Co., 529 F.2d 259, 271 (8th Cir. 1976); *see also* Gilbert v. Gulf Oil Corp., 175 F.2d 705, 709 (4th Cir. 1949).

[32] *See* Transcript at 96-100 (104a-108a).

[33] Dr. Messinger was clearly qualified as an expert in psychiatric medicine. *See* Transcript at 175-76 (109a-110a).

his opinion whether she may have suffered possible after-effects because of the forced medication, he replied that "she repeatedly stated her distress at getting the medication." [34] The court struck this answer as "not responsive." [35] But his response was not only directly related to the question; it was also supported by the Central Islip State hospital records.[36]

The court also abused its discretion by unnecessarily commenting on Dr. Messinger's testimony. When asked "whether she was in need of immediate treatment at the time she entered Bellevue," plaintiff's expert replied: "The last thing that I would do is give her drugs," which the court also characterized as not responsive.[37] Dr. Messinger later testified, in attempting to provide examples of analogous psychological trauma, that "if an orthodox Jew or Moslem were forced to eat pork, or if a woman were violated sexually, the effect of that event doesn't end at the termination of the physical event." [38] The court then remarked that "the examples were—at least one of them was very extreme and the jury can bear that in mind." [39] The court was not qualified as an expert in psychiatric medicine, and its characterizations of Dr. Messinger's expert opinions deprived appellant of her right to have the

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[34] Transcript at 198 (113a).

[35] *Id.*

[36] "She is constantly berating the hospital and officials for violating her personal rights and privileges as a human being and as a Christian Scientist." Central Islip State Hospital *Activity Summary*, May 17, 1968; Appendix at 176a.

[37] Transcript at 190-91 (111a-112a).

[38] *Id.* at 201 (115a).

[39] *Id.*

jury make its own determination as to the weight of the evidence.[40]

Appellant was further prejudiced by the trial court's fluctuations on the period of time for which evidence of emotional and physical suffering would be received. This Court in 1974 ruled only that "plaintiff is willing to abandon any claim that any present or anticipated physical or mental disability or condition was caused by the 1968 treatment." [41] Although this limited the case to the range of damages arising at the time of the forced treatment and for a reasonable time thereafter, at no time did plaintiff's counsel agree "that no damages would be claimed for any physical disability or mental disturbance arising from defendants' alleged acts." [42]

But the court was apparently mistaken throughout much of the trial, and consequently misinformed the jury, as to what constituted "present damages." For example, the court first said, "Well I think the case is restricted only to the ten weeks that she was in the hospital." [43] Later, the court changed its mind: "I guess present and past mental

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[40] Unfair characterizations of the plaintiff's case have in the past entitled such plaintiffs to new trials:

> No useful purpose can be served by listing the objectionable remarks complained of by the plaintiffs. They were, we think, clearly improper, unjustified and prejudicial. The trial judge, in making them, may have had no realization of how they sounded or of their impropriety, and probably had no actual intention of prejudicing the plaintiffs in the minds of the jury, but his remarks making light of the plaintiffs and their witnesses were, in our opinion, calculated to prevent the plaintiffs from having the sort of trial to which they were legally entitled.

Agee v. Lofton, 287 F.2d 709, 710 (8th Cir. 1961) (per curiam).

[41] Winters v. Travia, 495 F.2d 839, 941 (2d Cir. 1974) (56a).

[42] Memorandum and Order, *supra* note 6, at 3 (75a).

[43] Transcript at 100 (108a).

and physical suffering are still in the case." [44] Still later, this colloquy took place: "THE COURT: I understand that the plaintiff had withdrawn any complaint for any medical facts after the release from Central Islip. MR. WEISS: I don't believe we withdrew it to that degree." [45] The trial court's confusion on this point was undoubtedly a factor in explaining its antagonism to the testimony of appellant's experts, such as that offered by Dr. Messinger,[46] which was directed at the question of damages.

One final illustration of pertinent evidence erroneously excluded by the trial court concerns a memorandum issued by Dr. Miller, one of the defendants, following this Court's opinion in 1971. In that memorandum, written in his capacity as Commissioner of Mental Hygiene for the State of New York, Dr. Miller essentially stated that despite this court's 1971 decision, there would be no regulations on the subject at that time[47]—even though the problem had been under consideration for many years,[48] and even though it was his personal opinion that an involuntary patient should have the right to refuse treatment.[49] As plaintiff's counsel stated in his subsequent offer of proof:

> Essentially, the defendant's posture in this case will be that they didn't know about any specific problems in 1968, if they had known about it they would have taken appropriate steps. We wish to show once this defendant knew he still did nothing, showing in our

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[44] *Id.* at 199 (114a).

[45] *Id.* at 274-75 (121a-122a).

[46] *Quoted at* notes 34-38, *supra.*

[47] Transcript at 458-59 (130a-131a).

[48] *Id.* at 450-52 (127a-129a).

[49] *Id.* at 461-62 (133a-134a).

opinion, complete indifference to the rights of patients on this particular question."[50]

Certainly the memorandum was relevant to Dr. Miller's claim that he would have acted had he known specifically of the Christian Science problem, and as such was material to his assertion of the good faith defense. Miss Winters was entitled to have the jury consider the memorandum for that purpose, at least.

Nor should introduction of the memorandum have been barred by the "subsequent repairs rule," as suggested by the court.[51] The Federal Rules of Evidence, Rule 407, clearly allow such proof: "This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose such as . . . impeachment."[52] Rebuttal is another permissible purpose for introduction of such evidence.[53] Accordingly, appellant was prejudiced and denied a fair trial by this refusal of the trial court, and others discussed above, to admit relevant evidence rendered by plaintiff.

**(C)** ***The trial court improperly allowed irrelevant and prejudicial evidence which was offered at trial by defendants.***

The most glaring example of such irrelevant and prejudicial evidence revolves around the cross-examination of Miss Winters, when she was questioned about the events at the King George Hotel in Brooklyn which led to her involuntary commitment to Bellevue.[54] She was also ques-

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[50] *Id.* at 458-59 (130a-131a).

[51] Memorandum and Order, *supra* note 6, at 19 (91a).

[52] F. R. Evid., Rule 407, 28 U.S.C. (1976).

[53] American Airlines, Inc. v. United States, 418 F.2d 180, 196 (5th Cir. 1969).

[54] *See* Transcript at 280-85 (124.1a-124.6a), 291-92 (124.8a-124.9a).

tioned about previous attempts to have her involuntarily committed,[55] and about events at Bellevue, such as writing letters to politicians, which were totally irrelevant.[56] When plaintiff's counsel objected to these lines of questioning, the court replied, in overruling the objection, "No. This is her state of mind at the time she was at Bellevue." [57]

Since Miss Winters was not contesting the circumstances or the legality of the actual commitment, and since her mental state was not properly at issue, such testimony was irrelevant and should not have been allowed. It was prejudicial because it apparently led the jury to conclude, in part, that she was irrational and that her objections based on Christian Science were the product of mental illness. But the jury should not have been given even the opportunity to make such surmises, because those issues had already been foreclosed, and deemed irrelevant, by this Court in 1971, on the established principle that mental illness alleged or even proved does not imply legal incompetence to manage one's own affairs.[58] The trial court's failure to exclude such evidence, which should have been barred as "substantially outweighed by the danger of unfair prejudice," [59] was an abuse of discretion and contributed to the unfairness of the trial.

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[55] *See id.* at 285-86 (124.6a-124.7a).

[56] *See id.* at 294 (124.10a).

[57] *Id.* at 292 (124.9a).

[58] This Court had clearly ruled that a finding by a physician of possible mental illness does not strip a patient of the right to object to treatment. *See* text accompanying notes 11-12, *supra*. This Court also found, in perusing the record on that first appeal, that for "10 years prior to her admission to Bellevue Miss Winters had been a practicing Christian Scientist." 446 F.2d at 68 (40a). Thus speculation on the validity of appellant's beliefs was foreclosed as a matter of law.

[59] F. R. Evid., Rule 403, 28 U.S.C. (1976).

An analogous illustration of irrelevant and misleading evidence allowed by the trial court is the testimony of Dr. Howard Blankfeld, another defendant. He expressly stated that he discounted Miss Winter's religious objections to medical treatment because he believed them to be manifestations of a mental illness,[60] and that he ordered immediate medication in her own best interests. This testimony was especially damaging not only because it re-emphasized the error of the inquiry into plaintiff's mental state, but also because it ignored the whole point of this Court's 1971 opinion: that, without a finding of legal incompetency, a physician has no justification (except for protecting the patient or third parties) for substituting his own judgment for the patient's. In other words, the clear import of that decision and the sharp statutory distinction between "incompetency" and "insanity" is that the physician must take the patient's religious beliefs at face value when sincerely expressed.[61] Dr. Blankfeld's testimony thus contributed significantly to the distortion of issues at trial, since it allowed the jury to consider another possible defense already foreclosed by this court[62]—whether a defendant could interpose his own judgment for his patient's

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[60] Transcript at 512 (135a). The fact is that plaintiff's beliefs were established as a matter of law, note 58 *supra*, and this was supported by Appellant's own testimony at trial: "I began to completely rely on Christian Science probably about 15 years ago . . . 1960." Transcript at 278 (124a).

[61] This Court spoke most emphatically when it said that

> in the present case, where there is clear evidence that appellant's religious views pre-dated by some years any allegations of mental illness and where there was no contention that the current alleged mental illness in any way altered these views, there is no justification for defendants-appellees substituting their own judgment for that of their patient.

446 F.2d at 69 (43a).

[62] *Id.*

and to force the "professional" judgments of a hasty first "examination"[63] over a lifetime of religious principles. The literary language of Alexander Solzhenitsyn in *The Cancer Ward* (1968), particularly at 86-91, is appropriate: "Kostaglalov went on 'You start with the wrong presumption: Once a patient has entered the hospital you do all his further thinking for him . . . I'm just a grain of sand'." The tragedy is even *greater* when decisions, injections and tranquilizers are forced on that "grain of sand" over expressly stated, constitutionally protected religious objections.

One final example is Dr. Miller's statement that the right of a mentally ill patient to refuse treatment was first established by this court's opinion in 1971.[64] That statement was misleading, prejudicial and inaccurate, not only because Dr. Miller was unqualified to express an opinion on a matter of law, but also because this Court did not create any new rights but instead vindicated Miss Winters' rights under existing law against forced treatment at Bellevue and Central Islip Hospitals. This Court in 1971 recognized two principles: (1) that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ;"[65] and (2) that a mental patient did not lose that important right absent a court finding of legal incompetency.[66] The right of a mental patient to refuse treatment was thus established prior to plaintiff's stay at Bellevue and Central Islip, and her ob-

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[63] *Cf.* Id. at 70 (45a).

[64] Transcript at 460-61 (132a-133a).

[65] Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 93 (1914). *See also* Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, 1104, *clarified*, 187 Kan. 186, 354 P.2d 670 (1960); W. Prosser, *Torts* § 18, at 102 (3d ed. 1964); *Restatement of Torts* § 49 (1934).

[66] *See* discussion *supra*, at notes 12-15.

jection at trial to that testimony—testimony which implied, contrary to the law of the case, that for the purpose of the defendants' claims of good faith the right to refuse did not exist—should have been sustained. There is a crucial difference between ignorance of the law and a claim of good faith. Defendants should not have been allowed to hide the former behind the cloak of the latter, especially when, pursuant to their duties as servants of the public, these physicians *should have known*[67] that Miss Winters' right to refuse treatment did indeed exist.[68]

**(D) *The trial court's instructions to the jury were so confusing, inaccurate and misleading as to prevent the jury from fairly and properly considering plaintiff's claims.***

A universally accepted standard for jury instructions is that the trial judge must "instruct the jurors, fully and correctly, on the applicable law of the case, and guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth."[69] Because the trial court itself misstated, and refused to follow, the pertinent law of the case, its instructions on crucial points of law failed to "instruct the jurors, fully and accurately, . . . and assist them toward an intel-

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[67] The extensive training of physicians, which includes exposure to medical ethics, and their status in society as servants of the public—*cf.* the Hippocratic Oath—clearly imposes a greater knowledge of the rights of patients than would exist for the average citizen. *See also* discussion on the issue of foreseeability, *infra* at notes 91-102.

[68] This is particularly apparent given Dr. Miller's own testimony that an examination of patients' rights was well under way by 1968, and that medical opinion was in a state of flux at that time. *See* Transcript at 450-52 (127a-129a), 461-62 (133a-134a).

[69] 3 *Wright & Miller, Federal Practice and Procedure* § 2556 (1971).

ligent understanding" [70] of the relevant issues. Moreover, because the

> test on review . . . is that if "the requested instruction in accord with a party's contention is consistent with the evidence in the case, it must be granted unless the subject matter has been adequately covered in the court's charge," [71]

and because the court's instructions did not adequately cover the subject matter, the court's failure to give certain of plaintiff's requested instructions was error and entitles appellant to a new trial.

For instance, the court instructed the jury that it should decide whether plaintiff's rights were violated by the forced treatment,[72] when that issue was already decided as a matter of law.[73] If the court had given plaintiff's proposed instructions numbers 42 and 43,[74] this error of law would have been avoided:

> Accordingly, it is settled for this case and you are instructed to find, that plaintiff's constitutional rights were violated when she was forced to take medication under the circumstances of this case. The primary issue for the jury to determine is whether one or more of the defendants sued in this case should be held personally responsible in money damages for those violations of plaintiff's constitutional rights.

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[70] *Id.*

[71] Hare v. Firmin, 410 F.2d 231, 232 (5th Cir. 1969) (citation omitted).

[72] *Quoted supra*, at note 8; *see also* note 106, *infra*.

[73] *See* discussion *supra*, at notes 3-5, 11-18.

[74] Appendix at 193a-194a.

Another example of the court's misapprehension of the points of law involved in this case, and the transmission of that misunderstanding to the jury through inaccurate instructions, was the charge dealing with the relationship between plaintiff's alleged mental illness and her constitutional rights. The court told the jury that "a finding of a mental illness . . . doesn't *prove* that a patient is incompetent." [75] The court's refusal to give plaintiff's proposed instruction number 40,[76] which paraphrased the applicable law from this Court's 1971 opinion,[77] was a significant error. The instruction as given was not just incorrect; it also permitted the jury to draw the inference that a physician might still *assume* the patient to be incompetent to object to treatment. The court's instruction, by casting the principle in terms of "proof," implied that a physician could make assumptions of incompetency if such proof was lacking, whereas this Court's formulation, reflecting the clearly established difference between "insanity" and "incompetency" (as reflected in proposed instruction number 40), would have been an unequivocal statement that the physician cannot make *any* presumption, assumption or inference as to competency even if there is a preliminary diagnosis of mental illness. Plaintiff was entitled to the

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[75] Transcript at 672 (146a) (emphasis added).

[76] Plaintiff's Proposed Jury Instruction No. 40 reads as follows:

> Furthermore, the law is quite clear in New York that a finding of mental illness, even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is incompetent or unable adequately to manage his own affairs.

Appendix at 193a.

[77] 446 F.2d at 68 (41a). The court contended that use of the word "presumption" would have confused the jury. Memorandum and Order, *supra* note 6, at 13 (85a). However, there were no evidentiary presumptions in use during the trial, and the word could have been understood in its lay connotations rather than as a term of art. Moreover, he failed to suggest or use a synonym more "accessible" to laymen.

latter and legally correct instruction, as requested, on the issue of her competency to refuse medication.

The court's instructions on the issue of the good faith defense were also fatally inaccurate and misleading. Although the court was persuaded to read from *Wood* v. *Strickland*,[78] its instructions[79] failed to outline the complexities of the good faith defense and "assist [the jurors] toward an intelligent understanding of the legal and factual issues." [80] The Supreme Court has made it clear in that case that the test is not a simple one: in place of "an 'objective' versus a 'subjective' test of good faith . . ., the appropriate standard necessarily contains elements of both." [81]

The objective element of the good faith defense incorporates not only the rule that "an act violating . . . constitutional rights can [not be] justified by ignorance or disregard of settled, indisputable law," [82] but also the established principle that a defendant is liable for violations of "reasonably foreseeable" constitutional rights.[83] Appellant's objection on this point thus merges with her objection to the court's instructions on the issue of foresee-

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[78] 420 U.S. 308 (1975).

[79] *See* Transcript at 675-76 (148a-149a).

[80] 3 *Wright & Miller, Federal Practice and Procedure* § 2556 (1971).

[81] Wood v. Strickland, 420 U.S. 308, 321 (1975).

[82] *Id.*

[83] *Id.* at 322. It has even been argued that an official can be held liable "regardless of his lack of actual knowledge" of the rights he is allegedly violating. *See* Note, *Students' Rights Versus Administrators' Immunity:* Goss v. Lopez *and* Wood v. Strickland, 50 St. John's L.Rev. 102, 123 (1975). "Nor is such a strict standard unfair, for the implications of *Strickland* demonstrate that the Court is imposing no more than a reasonable standard of constitutional awareness." *Id.* at 127.

ability, discussed below.[84] The subjective component of the good faith defense, on the other hand, requires that each defendant *prove* that he was "acting sincerely and with a belief that he is doing right." [85] This element focuses on the state of mind of the defendant at the time of the alleged deprivation of rights, and thus requires that each defendant individually introduce at least *some* evidence concerning his actions and beliefs at that time.[86]

Plaintiff's proposed instructions numbers 47-51[87] correctly incorporated both the objective and subjective elements of the good faith test by providing that they "should be given only with respect to those defendants, if any, who introduce testimony or other evidence to support a good faith defense." [88] With respect to those defendants who did not introduce any evidence as to what their good faith intentions might have been, such as Doctors Ollins and DaCorta, the use of plaintiff's proposed instructions would have correctly foreclosed their claim to the good faith defense, since the burden of proof was on them to establish each element, both objective and subjective, of the defense. Nor, as the court suggested, does the copious testimony concerning the "general recognition of thorazine as proper treatment for schizophrenia" [89] support an inference of

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[84] *Infra* at notes 91-102.

[85] Wood v. Strickland, 420 U.S. at 321.

[86] The court clearly erred regarding the requirement of direct evidence to support a good faith defense. It allowed an objection to counsel for plaintiff's explanation of the requirement, *see* Transcript at 644-45 (141a-142a), and—in denying plaintiff's motion for a new trial—the court maintained that inferences of good faith could be drawn from all of the evidence. *See* text accompanying note 89, *infra*.

[87] Appendix at 195a-197a.

[88] *Id.* at 195a.

[89] Memorandum and Order, *supra* note 6, at 17 (89a).

subjective good faith as to *all* defendants, since there was no evidence of what that *particular defendant* thought about forcing medication on a *specific patient* over her *expressed religious objection.* Moreover, because the right of a mentally ill patient to refuse medication on religious grounds was at the least reasonably foreseeable in 1968, those defendants who were able to pass the subjective test of good faith should still have been denied the defense for failure to meet the objective component of the standard. Plaintiff was entitled to her own instructions on the issue of good faith, which set out the complexities of the good faith standard more accurately than the court's approach.[90]

In regards to the issue of foreseeability, the court instructed the jury as follows:

> Now with respect to foreseeability. You've heard *it is a fact that until 1971 'no court in this state had ruled on the first amendment right to free exercise of religion,'* a Christian Scientist who was legally admitted to a mental hospital had a constitutional right to refuse proper medication.
>
> *You may consider the importance of the first amendment and the fact that it's been part of the constitution for 200* years in determining whether the defendant should nevertheless have foreseen that such administration of drugs after a protest on Christian Science grounds was a violation of constitutional rights.[91]

This instruction failed to emphasize the teachings of numerous cases which, when taken together, clearly made Miss Winter's right to refuse treatment foreseeable in

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[90] Recall the rule that a party's requested instruction should be given except where the court's charge is adequate, which was active in this case. *See* text accompanying note 71, *supra.*

[91] Transcript at 678-79 (150a-151a) (emphasis added).

1968. In 1911, the New York Court of Appeals held that "[e]very human being of adult years has a right to determine what shall be done with his own body . . .," [92] and this principle was affirmed by other courts and secondary authorities prior to 1968.[93] As for the First Amendment aspects of the right to refuse treatment, cases too numerous to cite completely have reiterated these important teachings: "religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society," [94] and that freedom is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." [95] Analogously, the right to refuse compulsory selective service as a conscientious objector on religious grounds was established at an early date without need for discussion by the Supreme Court.[96]

More importantly, one court had by 1968 expressly ruled that a mentally ill patient had the right to refuse treatment,[97] which may be one factor explaining the re-examina-

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[92] Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 93 (1914).

[93] *E.g.*, Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, 1104, *clarified*, 187 Kan. 186, 354 P.2d 670 (1960); W. Prosser, *Torts* § 18, at 102 (3d ed. 1964); *Restatement of Torts* § 49 (1934).

[94] Braunfield v. Brown, 366 U.S. 599, 612 (1961) (Brennan, J., concurring and dissenting).

[95] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). *See* discussion in Weiss, *Privilege, Posture and Protection "Religion" in the Law*, 73 Yale L.J. 593, 609-612 (1964).

[96] Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

[97] In Re Brooks Estate, 32 Ill.2d 361, 205 N.E.2d 435, 438 (1965). In Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961, 968 (9th Cir. 1975), the court concluded that school board members could not be found to have violated "settled, indisputable" law where the courts were split on the question whether pregnancy could be excluded from sick leave benefits. In this case,

tion of patient's rights which was "well under way" at that time.[98] Also, the many cases involving religious objections to compulsory vaccination and blood transfusions,[99] which found that such treatment could only be compelled in extreme circumstances of impending death, were highly publicized and of such importance as to put physicians on notice to the general problem of religious objections to medical treatment. This Court, of course, in its first decision in this case cited much historical and case authority for holding medical treatment against religious objections to be a "constitutional tort." Other evidence of the foreseeability of the right to refuse treatment is the fact that early in 1968 Congress enacted a law which expressly prohibits medical authorities from compelling Medicaid recipients to undergo any examination or treatment if the patient objected on religious grounds.[100] Finally, the right to refuse treatment was at least as foreseeable in 1968 as was the right to be free from unreasonable searches and seizures in 1958, when the events took place which led to *Monroe* v. *Pape*,[101] one of the seminal cases involving claims for damages under Section 1983. And the pattern of that case and this are remarkably similar: both present questions of concurrent constitutional, statutory, and common

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where the highest court of Illinois had ruled positively on the issue, and no court had ruled to the contrary, the question was still open and there was enough independent evidence to cause physicians to be aware of the possibility of objections to treatment on religious grounds.

[98] *See* testimony of Dr. Miller, Transcript at 450-52 (127a-129a).

[99] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); Application of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (compulsory blood transfusion). *See generally* Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 Ind. L.J. 386 (1967).

[100] 42 U.S.C. § 1396f (1976) (Pub. L. 90-248, Jan. 2, 1968).

[101] 365 U.S. 167 (1961).

law violations, and the claim by defendants that their conduct should be excused because they had no knowledge they were violating any such rights. In *Monroe* that claim was found insufficient to bar personal liability, and the same result is called for in this case. All of these threads, then, when woven together made plaintiff's right to refuse treatment sufficiently forseeable as of 1968 to warrant a stronger instruction than "[y]ou may consider the importance of the first amendment and the fact that it's been part of the Constitution for 200 years." [102]

It is clear from the record that the jury was in fact confused and mislead by the inaccurate instructions offered by the trial court.[103] For example, after beginning its deliberations the jury sent the court a note which stated that it was confused about the good faith defense.[104] In response, the court re-read the original instructions on the subject of good faith, which had misled the jury in the first place.[105] But the most important indication that

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[102] Transcript at 678-79 (150a-151a).

[103] It is the function of the Courts of Appeals with respect to jury instructions to satisfy themselves that the instructions show no tendency to confuse or mislead the jury. *See, e.g.*, Harrington v. United States, 504 F.2d 1306 (1st Cir. 1974).

[104] *See* Transcript at 707 (158a).

[105] *Id.* The court's mere re-reading of its initial instructions on good faith was itself a prejudicial error.

> Where, as here, a jury makes known its difficulty and requests further instructions on the applicable to an important issue, the trial judge is required to give such supplemental instructions as may be necessary to guide it in the determination of the issue. . . . A perfunctory re-reading of the very instructions which may have led to the difficulty does not fulfill the requirement.

Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409, 415 (3d Cir. 1967) (citations omitted). Nor was the addition of the words "sincerely believe" to the original instructions a sufficient response to both plaintiff's request and the jury's confusion. *But cf.* Memorandum and Order, *supra* note 6, at 16-17 (88a-89a).

the jury was generally confused by the court's instructions is that it returned verdicts in favor of the two defaulting defendants, Doctors Kosovic and Grant.

As to those two defendants, the trial court had failed to charge the jury that their liability was settled as a matter of law, and that the jury had the duty to fix the appropriate amount of damages. This failure was the result of the court's ambiguous charge:

> Dr. Kosovic and Dr. Grant were not represented here and we say they are in default. You have a *right* to fix damages against them.[106] . . . *It is a little hard to know just what to do about Dr. Covick* [sic] *and Dr. Grant.* I left the liability blank, but really you should fill in the liability. . . .[107]

When the jury instead returned verdicts in favor of both defaulting defendants, that indicated either that the jury disregarded the court's instructions,[108] or that they were

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[106] Transcript at 687-88 (154a-155a).

[107] *Id.* at 693 (157a) (emphasis added).

[108] The law is well settled that when a jury returns a verdict contrary to the court's instructions, the court is obligated to grant the motion for a new trial of the party adversely affected. *See* Chicago, Rock Island & Pac. R.R. Co. v. Speth, 404 F.2d 291, 295 n.4 (8th Cir. 1968); 6A *Moore's Federal Practice* ¶ 59.08[4] (1974). The decision of a jury in disregard of the law cannot stand. Hartman v. White Motor Co., 12 F.R.D. 328, 337 (W.D. Mich. 1952). Nor is a partial new trial appropriate here, since the general rule in such circumstances is that a new trial is required with respect to all issues. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 497 (1931). This is because the court cannot be certain that the error which affected one part of the verdict did not affect the remainder of the verdict. *See* Camalier & Buckley-Madison, Inc. v. Madison H., Inc., 513 F.2d 407, 422 (D.C. Cir. 1975); Romer v. Baldwin, 317 F.2d 919, 922-23 (3d Cir. 1963). This standard for a new trial, when there is doubt as to the validity of a verdict against some defendants, has been adopted by this Court. *See* Rivera v. Farrell Lines, Inc., 474 F.2d 255, 259 (2d Cir. 1973); Caskey v. Village of Wayland, 375 F.2d 1004 (2d Cir. 1967).

so confused by the charge[109] as to fail to find the amount of damages as was their responsibility. Either explanation entitles appellant to a new trial,[110] on the grounds that the jury could not have given plaintiff's claim fair and deliberate consideration.

## POINT III

**Remarks Made at Trial by the Trial Court and by Defendants' Attorneys Were So Prejudicial as to Influence the Jury and Deprive Appellant of Her Right to a Fair and Impartial Trial.**

The court at various points throughout the trial made remarks which conveyed inaccurate impressions of applicable law, or were generally prejudicial to plaintiff. The

> trial judge, in making them, may have had no realization of how they sounded or of their impropriety and probably had no actual intention or prejudicing the plaintiffs in the minds of the jury, but his remarks making light of the plaintiffs and their witnesses were, in our opinion, calculated to prevent the plaintiffs from having the sort of trial to which they were legally entitled.[111]

For example, the court on a number of occasions made unnecessary remarks which negatively characterized plaintiff's own testimony concerning the emotional and physical

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[109] The trial court itself admitted that the jury was confused on this issue. *See* Memorandum and Order, *supra* note 6, at 12 (84a).

[110] An indication of jury confusion also requires a new trial. *See* Wood v. Holiday Inns, Inc., 508 F.2d 167, 175 (5th Cir. 1975).

[111] Agee v. Lofton, 287 F.2d 709, 710 (8th Cir. 1961) (per curiam).

suffering she experienced. In describing the initial occurrence at Bellevue Hospital, she remarked: "I was just seized and I felt the whole thing a murderous assault upon my person." [112] The court immediately struck this answer, as not responsive to the question, but it was clearly indicative of how deeply the forced medication had affected her. The jury should have been allowed to consider this important, material and relevant testimony. Later she stated that "I allowed myself to be photographed because the injection was so physically, not only physically but psychologically painful— ".[113] An objection to this testimony was also sustained on the grounds that it was "beyond the question." [114] Again, this evidence was extremely pertinent to the issue of damages, and to bar it on purely technical reasons was an abuse of discretion.

The court's apparent hostility to plaintiff as a witness continued during most of her testimony: "Miss Winters, do you recall what physical sensations you had after the first injection. . . . Shock. The Court: That's not exactly physical." [115] Then, after a further inquiry as to her feelings or sensations: "I just felt strange. I couldn't describe it. I don't know—sort of perhaps a person under the influence of some narcotic would feel that way. I don't know. . . . The Court: I think the answer is rather speculative. I will let it stand. The jury can evaluate it." [116] One final illustration of the court's demeanor towards plaintiff is the following: "It was such a shock and be-

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[112] Transcript at 259 (116a).

[113] *Id.* at 267 (117a).

[114] *Id.*

[115] *Id.* at 271 (118a).

[116] *Id.* at 272 (119a).

wildering experience—I didn't know why it happened and why I was being forcibly treated and medicated and examined and probed against my will— . . . The Court: Please. You are a witness and your purpose here is to answer questions limited to the question. . . . Don't launch into a discussion on anything more than you are asked." [117] These and other examples in the trial transcript indicate a dislike, if not contempt, of appellant as a witness,[118] an attitude communicated to the jury and which destroyed the jury's impartiality. These remarks by the court also had the effect of reinforcing the erroneous premise which plagued plaintiff's entire case: that she was mentally incompetent, both at the time of her commitment to Bellevue Hospital and continuing up to and including the time of her testimony at trial. Of course, this premise was entirely false and should have been laid to rest by this Court's opinion in 1971, as is shown above.

There were other instances of misleading and prejudicial statements by the court. For example, the court during *voir dire* told prospective jurors that each defendant would be individually responsible for any money damages;[119] this remark was later picked up by defense attor-

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[117] *Id.* at 276 (123a).

[118] The trial court stated in its Memorandum and Order, *supra* note 6, at 4 (76a): "Plaintiff's personality was not one likely to appeal to a jury. . . . Her demeanor on the stand was combative and argumentative." Because the court made clear its dislike of the plaintiff, the jury was effectively prevented from making up its own mind.

[119] This is one of the many errors of law which took place during "pre-trial" activities which appellant is unable to document because the transcripts are unavailable. Appellant's second motion for a new trial based on this ground was denied, *see* Memorandum of Decision and Order, dated March 1, 1977 (Mishler, Ch. J.) (94a), and appellant has also appealed from that order. *See* text accompanying note 28 *supra*.

ney Weiler in his closing statement.[120] Whether true or not (and appellant strongly believes it is not),[121] Miss Winters was entitled, by analogy to the well-known rule prohibiting any mention of insurance or the lack thereof, to have such remarks excluded from the trial.[122] The refusal of the court to correct the error during its closing instructions[123] was another abuse of discretion, and compounded the original error.

There were other instances of misleading and prejudicial statements at trial. In reference to defendant Dr. Miller's failure to issue regulations on the subject of religious objections to treatment, the court stated: *"It would be imposing strict standards to say that Dr. Miller was at fault* for not issuing a regulation to deal with the situation but the plaintiff said that the first amendment is so important that Dr. Miller should have thought of it and I will let you decide that issue."[124] This was one of the most

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[120] Transcript at 619 (140a).

[121] Defense attorney Kantor conceded that the state's policy was to reimburse all defendants acting in their official capacity, even though § 17 of the *N.Y. Pub. Officers Law* (McKinney's Supp. 1976)—which expressly provides for such payments—was not effective until July 2, 1971. This *de facto* policy was confirmed by the fact that the judgment against defendant Dr. Miller in another case—Dale v. Hahn, 486 F.2d 76 (2d Cir. 1973), *cert. denied sub nom,* Miller v. Dale, 419 U.S. 826 (1974)—was paid by the State. In fact, the State of New York argued in its brief (by the same Attorney General's Office) in that case that it "is clear that the statute [Public Officers Law § 17] would compel the State of indemnify the individual appellants should they be required to pay these moneys. . . ." Dale v. Hahn, *supra,* Brief for Defendants-Appellants (June 12, 1973, Docket No.: 73-1795).

[122] "[T]he substance of the voir dire examination is subject to the right of the parties to have an impartial jury. . . ." Labbee v. Roadway Express, Inc., 469 F.2d 169, 172 (8th Cir. 1972).

[123] Transcript at 663-65 (143a-145a).

[124] Transcript at 686 (153a) (emphasis added).

crucial issues in the case, and it was highly prejudicial for the court to provide the jury its own views on whether Dr. Miller was responsible. Then, in reference to defendant Dr. Blankfeld's testimony, the court remarked:

> Dr. Blankfeld was in the emergency room when the plaintiff was brought in by the police as *described in a state of agitation* and on the recommendation of the Department of Welfare he recommended medication by injection. Even though he had heard she was a Christian Scientist and that she objected to even a physical examination, *under the law set down by the Court of he shouldn't have done that* but he says *he did what he thought was in good faith for the plaintiff's best interest* believing her to be mentally ill.[125]

This last remark was improper and misleading in two respects. The contention that appellant was in a "state of agitation" more noticeable than normal for the circumstances is not supported by the hospital records, as this Court so found when it initially surveyed those records.[126] Secondly, Dr. Blankfeld's testimony that he substituted his own judgment for Miss Winter's should have been originally barred as contrary to the law of the case,[127] and for the court to repeat the testimony only compounded that error, especially since it suggested that the law of the case was not controlling.

One final illustration of gratuitous and prejudicial comments made by the court involves the absence of both plaintiff and most of the defendants during the trial. Although the court knew Miss Winters to be a long-time recluse, and

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[125] *Id.* at 686-87 (153a-154a) (emphasis added).

[126] 446 F.2d at 70 (45a).

[127] *See* discussion *supra*, at notes 60-62.

was aware of the tremendous effort necessary just to bring her in to testify (the court was aware that plaintiff's deposition had to be conducted in her hotel room), the court felt compelled to make this statement: "Normally I would expect the plaintiff who is suing for thirty or more thousand dollars to be present to see what was going on."[128] That unnecessary remark was made even more glaring by the court's next statement, which suggested that although plaintiff was expected to be present at all times, it was a different case for the defendant physicians:

> Dr. Dromgould [sic] . . . is the only doctor who has been here most of the time. You can consider in both instances whether this indicates any indifference to the case. Whether it represents an *overconfidence* or whether the doctor is simply relying on *their expectations that the verdict will be decided on the merits* and that *they might have a good case* and they may not.[129]

And on the same subject of absence from the trial, defense counsel Kantor remarked:

> Now, I'll be quite candid with you. I wish Dr. DaCorta was here and had been here to speak with you to tell you what he believed and thought, understood what his understanding of what happened was. I'm sure you would have preferred it. But, as you learned yesterday, for reasons beyond his control, he was unable to come from Oswego to New York to be here.[130]

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[128] Transcript at 685 (152a). Compare the court's comment in its Memorandum and Order, *supra* note 6, at 4 (76a): "She did not attend any part of the five-day trial, except for the few hours she was on the stand as a witness."

[129] *Id.* (emphasis added).

[130] Transcript at 581 (135.1a).

But when appellant's counsel asked that this remark be stricken, because "we think that [it] gives the impression if he had been here and testified he would have said I didn't know anything about it or acted in good faith," [131] the court declined to correct any prejudice which may have resulted from the remark.

Other suspect and even blatantly misleading comments by defense counsel, which the court found unobjectionable, include the following:

> Now, this is a very odd case. These doctors and Dr. Blankfeld in particular are being sued here because he successfully treated Miss Winters for a mental illness . . . . Also, I think it is very important in this case that the plaintiff through her lawyers have not contested the legality and the propriety of her being admitted to the hospital. They hadn't contested that because it is not contestable . . . . That is admitted in this case.[132]

> [T]hree years after this happened the rug got pulled out under these doctors . . . . Something like getting a speeding ticket a week after you were driving and find out Hey, they changed the speed limit on me . . . . this reinterpretation of the First Amendment . . . .[133]

This last statement was especially unfortunate for plaintiff since it was not only an inaccurate expression of the law, but also had the effect of reinforcing the court's erroneous instructions on the same subject.[134]

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[131] *Id.* at 595 (136a).

[132] Transcript at 596-97 (137a-138a).

[133] Transcript at 608 (139a).

[134] *See* text accompanying note 91, *supra.*

In contrast, the court apparently felt obliged to comment on the statements by plaintiff's counsel, such as his remark that defendants based their defense on the hope that the jury would be indifferent to Miss Winters' constitutional rights.

> The plaintiff charged the defendants with that hoping you would be indifferent to the plaintiff's constitutional rights. I don't think that is necessary, it is an interpretation of their argument. You shouldn't be indifferent to plaintiff's constitutional rights, but you should consider also the rights of the defendants and whether the plaintiff has shown a violation of constitutional rights.[135]

This final illustration not only suggests the difference in treatment accorded plaintiff at trial, but also brings this argument back to its primary contention: the trial court was mistaken about the issues at trial and the applicable law of the case, and erroneously allowed such questions as "whether the plaintiff has shown a violation of constitutional rights" to go to the jury[136] as initially unproven and to be decided by a balancing of judgments rather than an affirmation of constitutional rights. And this final point also raises another of appellant's claims of error on this appeal: namely, that the district court erred in not granting her second motion for a new trial, which was based on the unavailability of certain transcripts for pre-trial bench conferences. The lack of transcripts for these proceedings is important because it was at these preliminary conferences that the court first made clear its mistaken conception of the case, and Miss Winters is now prevented

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[135] Transcript at 690 (156a).

[136] *Id.*

from effectively documenting that crucial error on this appeal.

## CONCLUSION

In a previous opinion in this case,[137] this Court took pains to point out that the appearance of justice was almost as important as the fact of it:

> [S]uch judicial conduct [a decision of Judge Travia without reference to briefs or argument] is the very kind of thing that calls to mind Farrer Herschell's well-known retort at the Bar when Sir George Jessel attempted to cut him short in argument:
>
> > "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it." 2 J. ATLAY, VICTORIAN CHANCELLORS 460 (1908).[138]

It is equally important today for Miss Winters to be given a real chance to prove the amount of her damages before a properly selected jury, free from the egregious errors of law made by the trial court below and which are discussed herein. For when this court held in 1971 that her First Amendment rights were clearly violated and gave her the opportunity to collect an award of damages to assuage her emotional and physical damages, it surely could not have envisioned that she would win only $800 in damages, and then only because two defendants defaulted. The result below makes mockery both of the

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[137] Winters v. Travia, 495 F.2d 839 (2d Cir. 1974) (56a).

[138] *Id.* at 842 (61a).

appearance and actuality of justice, and fairness demands a new trial for this still-aggrieved plaintiff.

Respectfully submitted,

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Dated: New York, New York
March 15, 1977

Counsel Press, 55 West 42nd Street, PE 6-8460
(6162)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | |
|---|---|
| MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,<br><br>Plaintiff-Appellant,<br><br>-against-<br><br>ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; and Doctors H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and CATHERINE DROMGOOLE, and other doctors on the staffs of Bellevue and Central Islip Hospitals whose names are unknown to plaintiff,<br><br>Defendants-Appellees. | AFFIDAVIT OF SERVICES<br><br>Index No.: 76-7053 |

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.:

DENNIS R. PEARSON, being duly sworn, deposes and says:

1. That he is not a party to this action, that he is over the age of 18 years, and that he resides at 201 E. 10th Street, #7, New York, New York 10003.

2. That on the 15 day of March, 1977, he served the within Brief for Appellant, and Appendix, on LOUIS J. LEFKOWITZ, Attorney General, State of New York, 2 World Trade Center, New York, New York 10047, Attention: Joan Scannel, Esq.; and W. BERNARD RICHLAND, Corporation Counsel, City of New York, 1656 Municipal Building, New York, New

York 10007, Attention: Kevin Sheridan, Esq., attorneys for defendants-appellees, by personally delivering the requisite copies thereof at the offices and addresses herein named.

3. That on the 15 day of March, 1977, he served the within Brief for Appellant, and Appendix, on BRUCE J. ENNIS, New York Civil Liberties Union, 80 Fifth Avenue, New York, New York 10011, trial co-counsel for plaintiff-appellant; and LAWRENCE KESSLER, Hofstra University School of Law, 1000 Fulton Avenue, Hempstead, New York, 11550, trial counsel for defendant-appellee Dr. Howard Blankfeld, by placing copies thereof in a properly addressed postpaid wrapper and placing the same in the exclusive care and custody of the United STates Postal Department within the State of New York.

Dennis R Pearson
DENNIS R. PEARSON

Sworn to before me this
15 day of March, 1977.

Jonathan A Weiss
NOTARY PUBLIC

JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 1977

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

**LEGAL SERVICES FOR THE ELDERLY POOR**

*Attorneys for*

*Office and Post Office Address*

**2095 Broadway—Suite 304**

**Borough of Manhattan** **New York, N. Y. 10023**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

**LEGAL SERVICES FOR THE ELDERLY POOR**

*Attorneys for*

*Office and Post Office Address*

**2095 Broadway—Suite 304**

**Borough of Manhattan** **New York, N. Y. 10023**

To

Attorney(s) for

Index No. 76-7053 Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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-against-

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; et al.,

Defendants-Appellees.

AFFIDAVIT OF SERVICES

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To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for